

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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TROOPER 1, :
 : 22-CV-893 (LDH) (TAM)
 Plaintiff, :
 : January 8, 2024
 v. : Brooklyn, New York
 :
 NEW YORK STATE POLICE, :
 et al., :
 Defendant. :
-----X

TRANSCRIPT OF CIVIL CAUSE FOR STATUS CONFERENCE
BEFORE THE HONORABLE TARYN A. MERKL
UNITED STATES MAGISTRATE JUDGE

APPEARANCES:

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1 THE CLERK: Civil cause for status
2 conference, case number 22-CV-893, Trooper 1 v. New
3 York State Police, et al.

4 Before asking the parties to state their
5 appearances, I would like to state the following:
6 Persons granted remote access to proceedings are
7 reminded of the general prohibition against
8 photographing, recording, and re-broadcasting of court
9 proceedings. Violations of these prohibitions may
10 result in sanctions including removal of court-issued
11 media credentials, restricted entry to future hearings,
12 denial of entry to future hearings, or any other
13 sanctions deemed necessary by the Court.

14 Due to the number of callers on the line, I
15 remind everyone to please state their full name when
16 addressing the Court. That being said, will counsel
17 for plaintiff please state your appearances for the
18 record.

19 MR. CRAIN: This is John Crain for plaintiff
20 Trooper 1, from Wigdor LLP, and I'm joined by Valdi
21 Licul.

22 THE CLERK: Counsel for defendant New York
23 State Police, please state your appearance.

24 MR. STEELE: Joshua Steele from Harris Beach
25 PLLC for the New York State Police.

1 THE CLERK: Counsel for defendant Andrew
2 Cuomo, please state your appearances.

3 MS. GLAVIN: Good afternoon, your Honor.
4 Rita Glavin along with my colleague, Leo Korman, of
5 Glavin PLLC, for former Governor Andrew Cuomo.

6 THE CLERK: Counsel for defendant Melissa
7 DeRosa and Richard Azzopardi, please state your
8 appearances for the record.

9 MS. FOTI: Good afternoon. Catherine Foti
10 from Morvillo, Abramowitz, Grand, Iason & Anello for
11 Melissa DeRosa and Richard Azzopardi. And on the line
12 is my associate, Kayasha Lyons.

13 THE CLERK: Okay, Judge, that is everyone
14 for this conference.

15 THE COURT: All right, thank you all. As
16 you all know, we're here for a very narrow conference.
17 I have limited time, as indicated by the docket, due to
18 a number of other commitments this afternoon. The
19 parties recently filed document 200, ECF 200,
20 indicating their inability to reach a conclusion as to
21 a date range vis a vis the phone records. I note at
22 the outset that the parties did reach a conclusion as
23 to basically one year worth of records, which it
24 appears that the parties have agreed to December 1st,
25 2020 through December 1st, 2021.

1 Mr. Cuomo has argued relevance preceding the
2 initiation of the investigation into former Governor
3 Cuomo's actions that predate the December, 2020 time
4 period. I also -- the reason we're having the
5 conference is because what I did not see in the
6 parties' discussion here is what date ranges would
7 cover some of the matters that we discussed previously
8 on the record at our last in-person conference in
9 December.

10 By that, I specifically am referring to
11 phone records that would cover a time period related to
12 Trooper 1's communication with Diane Perata (ph)
13 surrounding the time that she was deposed in this case.
14 I also did not see a time frame that would necessarily
15 cover all of this potential conversation with Officer
16 Nevins (ph) or Trooper Nevins. I do believe that some
17 of the Nevins communications occurred in 2021 so they
18 would be covered in the December 1st, 2020 to December
19 1st, 2021 time period.

20 Mr. Licul, correct me if I'm wrong but I
21 thought in our prior conversation, we had talked about
22 including a swath of records that would cover the
23 Perata contact so that we didn't have to deal with the
24 Perata subpoena anymore. My recollection was that
25 Governor Cuomo agreed that if Trooper 1 was going to

1 provide her phone records surrounding the time of her
2 deposition, not just select communications with Perata
3 but the phone records that covered the relevant time
4 frame for Ms. Perata's deposition, that that would also
5 help put to rest your arguments regarding the
6 intrusiveness of the phone record subpoena to Ms.
7 Perata and the members of her family. So I was
8 expecting to see a time period in 2023 and I didn't.
9 Mr. Licul, can you please start and then I'll turn to
10 the defendants.

11 MR. CRAIN: Hi, your Honor, this is John
12 Crain for plaintiff Trooper 1. Now, we had already --
13 and I believe this had been discussed. We had already
14 produced phone records around the time period of the
15 Perata deposition so they have those records and that
16 issue from our point of view is put to rest.

17 Now, as to the Nevins communications --

18 THE COURT: Just to be really clear, just to
19 be really clear, did you produce all of the phone
20 records from that time period or just evidence of
21 communications between Trooper 1 and Diane Perata
22 herself?

23 MR. CRAIN: That was between -- that's
24 correct, between Trooper 1 and Diane Perata herself.

25 THE COURT: That is insufficient, as we

1 discussed at the last conference, because wasn't she
2 also in communication with certain of Diane Perata's
3 family members?

4 MR. CRAIN: No, your Honor, she wasn't.
5 Diane Perata, as the text messages show, tried to reach
6 out to her from various sources but the two did not
7 communicate.

8 THE COURT: That does not answer my
9 question. Would the phone records pertinent to Trooper
10 1 show contacts from individuals from other parts of
11 Perata's family in the time frame of Perata's
12 deposition, and are those produced?

13 MR. CRAIN: Your Honor, I don't know off the
14 top of my head regarding whether or not the other --
15 the other ones would show. Actually, I believe when we
16 looked into it, they did not because Trooper 1 did not
17 answer the phone. So I believe those --

18 THE COURT: This is why they want to go to
19 the phone company. They want to get the incoming and
20 outgoing phone calls relating to the time period around
21 the Perata deposition. We discussed this at length in
22 December and it is very disheartening, and this goes to
23 both sides, to see that you couldn't reach an agreement
24 on something this simple after discussing it at length
25 at the prior conference. You guys need to learn how to

1 meet and confer significantly better than you are
2 because you cannot expect that I'm going to be able to
3 drop everything and have a conference every week
4 because you can't reach an accommodation on something
5 as minor as this after we've had oral argument on it.

6 MR. CRAIN: Your Honor --

7 THE COURT: I made it very clear in December
8 that the phone records surrounding the Perata
9 deposition that could evidence communications to
10 Trooper 1, successful or not -- they will show up as
11 incoming calls on Trooper 1's phone records -- were
12 relevant and that they needed to be produced. So what
13 is the time frame that would be pertinent to the Diane
14 Perata piece of this from your perspective, Mr. Crain?

15 MR. CRAIN: I understand based on defendant
16 Cuomo's theory of the relevance of those records, it
17 would be in a range of about one week before and one
18 week after the deposition.

19 THE COURT: What are the dates?

20 MR. CRAIN: The dates -- I would just have
21 to look up the date of the deposition, which if I
22 recall --

23 THE COURT: This is why I directed the
24 parties to meet and confer, because I don't have the
25 deposition transcript. I don't have your schedules

1 before me. That's exactly why parties are expected to
2 be able to resolve these issues on their own.

3 Ms. Glavin, what was the date of this
4 deposition?

5 MS. GLAVIN: Ms. Perata's deposition was in
6 late July, 2023 but the phone records -- it's more,
7 your Honor, than just a week before the deposition. If
8 the Court might recall, and I apologize for not putting
9 this in the letter, but Diana Perata testified that she
10 had had lunch with Trooper 1 within a couple -- I think
11 maybe in or about May of 2023. She could not remember
12 who got in touch with who, how the lunch was set up,
13 which is one of the reasons why we need a broader swath
14 of the time period and we want the phone records
15 through 2023. But, your Honor, I do want to bring
16 something to the Court's attention that --

17 THE COURT: One thing at a time. The first
18 thing we're doing is figuring out the time period
19 relevant to the Diane Perata records. Is this directly
20 relevant to that, Ms. Glavin?

21 MS. GLAVIN: It is.

22 THE COURT: Okay, continue.

23 MS. GLAVIN: Okay. Your Honor, in the
24 Charlotte Bennett (ph) case which is pending in the
25 Southern District of New York and has a different

1 discovery schedule, Trooper 1 has been identified in
2 both plaintiff's Rule 26 disclosures and in the former
3 governor's. We subpoenaed Trooper 1's phone records in
4 the Bennett case pursuant to a Rule 45 subpoena that
5 was done on notice to the parties. The subpoena was
6 served last month, in or about December 4th, and records
7 were received responsive to that subpoena after
8 Christmas of this year. The phone records -- the
9 subpoena covered the period January 1st, 2020 to the
10 present in that litigation. We received a return on
11 the subpoena.

12 We informed plaintiff's counsel this morning
13 that we believe the issue of the phone records is now
14 moot because they were subpoenaed in the separate
15 action. What we offered to plaintiff's counsel in
16 order to agree that the issue before your Honor was
17 moot was that we would provide those phone records to
18 plaintiff's counsel and they could redact attorney
19 information from those phone records, which we're
20 willing to do such that this becomes moot.

21 THE COURT: Okay. Mr. Crain?

22 MS. GLAVIN: We haven't -- we haven't looked
23 at the records, which is what I represented to Mr.
24 Licul this morning, but we think the issue is moot and
25 we could look at the records at any point we wanted to

1 because they've been properly subpoenaed, but we're
2 offering that as a compromise such to eliminate this
3 issue before the Court.

4 THE COURT: Mr. Crain, would you like to
5 respond?

6 MR. CRAIN: Yes. I want to also keep it
7 focused on the two sets of records you're talking
8 about. But as a general matter, we don't agree that
9 it's a moot issue. If the discovery in that case was
10 meant to find information relevant to this case, it was
11 improper discovery in that case and this Court could
12 still limit the use of those documents in this case by
13 applying a protective order, for instance. We think
14 that would be appropriate since the parties were in
15 full negotiation of this issue to begin with and this
16 shouldn't just be end run now at this point, after time
17 has been spent deciding these objections.

18 But I'll say, you know, the Court --
19 clearly, now it's the records around Diane Perata and
20 certain phone numbers will be discovered. And to the
21 extent that those are going to come out of these
22 records, fine. And to the extent that the range that
23 the parties have agreed upon will come out of these
24 records, fine. But apart from that, we do stand on our
25 objections and we think a protective order is an

1 appropriate way to enforce those objections.

2 THE COURT: This is sort of the one the
3 things about civil discovery that is just so odd,
4 right? They have the records subpoenaed on notice in
5 another case. To pretend that they don't and to parse
6 the phone records during the discovery phase and issue
7 a protective order requires a level of granular
8 knowledge of the facts and circumstances and all of the
9 potential twists and turns that would require days of
10 evidentiary hearing for me to make a truly informed
11 ruling on. And that's not what the purposes of civil
12 discovery are. Civil discovery is broader than what
13 documents will ultimately be relevant at the ultimate
14 trial. And if they have the documents, they have the
15 documents. They're not going to be able to unsee them
16 once they start to review them.

17 So as to whether or not they would be usable
18 here, who knows? They're going to have to be found
19 relevant, authentic, all of the normal things. But
20 what would you even want me to have a protective order
21 look like? Say they can't rely on anything before
22 December 1st, 2020 or anything in 2022?

23 MR. CRAIN: That they should -- that we
24 should essentially treat it as though the previous
25 negotiations were in effect, that they have to submit

1 -- produce everything to us and apart from the records
2 that are discoverable, delete the rest of the records.

3 THE COURT: They have them in the other
4 case. To suggest that they're doing an end run around
5 the discovery process here because they found them
6 relevant in the related case is -- I don't know what
7 factual basis you might have for that assertion.
8 They're not going to delete them. They're relevant in
9 the other case. They're going to analyze them.
10 They're going to analyze them so that seems
11 indisputable.

12 What I think you should do is what Ms.
13 Glavin suggested. They have not reviewed them.
14 They're willing to produce them to you. You can go
15 through them. You can redact them for the
16 attorney/client communications, any psychiatrist or
17 therapist communications, things we talked about along
18 those lines. And if you find that there are certain
19 swaths of those records that you think are the proper
20 subject for some sort of protective order, you can let
21 me know. But I am not going to issue a theoretical
22 protective order on the basis of phone records that I
23 haven't seen and that you haven't analyzed.

24 MR. CRAIN: Understood, your Honor. To be
25 clear, for one reason or another, Trooper 1's phone

1 company did not make her aware that this was happening,
2 so there's no chance to object and there was no finding
3 of relevance in that case, but your Honor's
4 instructions are clear.

5 MS. GLAVIN: Your Honor --

6 THE COURT: Ms. Glavin.

7 MS. GLAVIN: -- one caveat.

8 THE COURT: Yes, go ahead.

9 MS. GLAVIN: Yeah, just one caveat quickly
10 to that. I'm fine sending the records over to
11 plaintiff's counsel for redaction of attorneys' phone
12 numbers. We do -- after our last conference and having
13 had some time to think about this, we do have an
14 objection to redaction of therapist or medical
15 providers' telephone numbers simply because we've
16 already received discovery. I mean, she's seeking
17 damages and it is relevant how often she's talking to a
18 doctor or medical provider, and we've already received
19 a lot of healthcare records already. So I think it
20 should be limited to just the attorneys, and we would
21 like a list from plaintiff's counsel of the names of
22 the attorneys whose numbers they redacted.

23 THE COURT: Are you seeking emotional
24 distress damages above and beyond garden variety in
25 this case, Mr. Crain?

1 MR. CRAIN: We are.

2 THE COURT: Have you already provided HIPAA
3 authorizations for her medical providers, therapists,
4 and similar?

5 MR. CRAIN: We've provided the records
6 themselves.

7 THE COURT: Okay. No HIPAA authorizations?

8 MR. CRAIN: We did not go the way of HIPAA
9 authorizations.

10 THE COURT: Is that going to be a problem
11 later on, Ms. Glavin?

12 MS. GLAVIN: It may be, and I think that
13 we'll be able to work it, won't we, Mr. Crain?

14 MR. CRAIN: I believe so. I think we're
15 already there.

16 THE COURT: Okay. So this is the thing: I
17 don't have any idea what's in these phone records and
18 neither do the plaintiff's attorneys at this juncture.
19 So my view as to whether or not every single doctor is
20 relevant stands, right? She may or may not be seeing
21 people who are completely irrelevant to the issues in
22 this case and she is entitled to some privacy, as we
23 all are, Ms. Glavin, regardless of the fact that she
24 brought a lawsuit. If she's seeing somebody for an
25 independent, separate and distinct medical issue that

1 is not relevant to her claims of emotional distress
2 damages, is not contributing to any psychological
3 issues she claims to be having, et cetera, et cetera,
4 she's entitled to privacy on that point. I'm not going
5 to get into a theoretical debate about which phone
6 numbers need to be redacted when we don't even know
7 what these records contain.

8 So I think the first step is for you to give
9 the records to the plaintiff's attorney. They will
10 look through them, they will discuss them with their
11 client, they will figure out if there are areas that
12 they think need to be redacted. They will provide you
13 a list of what they are redacting and why,
14 attorney/client communications, these are the
15 attorneys, attorney/client communications, these are
16 the attorneys, doctor/patient privilege relating, you
17 know -- I'm going to think of something -- whatever I
18 think of, you're going to tie it back to anxiety and
19 stress and interrelated causation, Ms. Glavin, but
20 there has to be a condition out there that can't be put
21 in that bucket.

22 I'm not going to theorize as to what it
23 might be but there's got to be. So until and unless we
24 know what these records contain, I don't want to have
25 an esoteric debate about whether or not those things

1 can be redacted.

2 MS. GLAVIN: Got it.

3 THE COURT: Mr. Crain, does that work for
4 you to start?

5 MR. CRAIN: Yes. So my understanding is,
6 we'll take the records, we'll redact communications
7 with attorneys. We'll redact any medical
8 communications not relevant to emotional distress and
9 we may need to confer about the scope of the rest of
10 medical discussions or medical-related discussions.

11 THE COURT: I think you will need to confer
12 about the scope of the rest of the medical discussions.

13 Ms. Glavin, what did you want to say?

14 MS. GLAVIN: No, that was it. I said I got
15 it. We'll give them the phone records and the
16 redactions for attorneys and for them to keep a list of
17 the attorneys, and the medical providers.

18 THE COURT: Okay. But if these are related
19 to folks she's seeing in regard to her emotional
20 distress damages, I do think that they -- there is
21 relevance there. So that certainly clarifies things to
22 some degree. As Ms. Glavin has not yet looked through
23 the records, I don't know for sure whether or not this
24 production of these phone records entirely moots out
25 the issues surrounding the Diane Perata phone record

1 subpoenas as well. But at the prior conference, Ms.
2 Glavin, correct me if I'm wrong, the anticipated --
3 Trooper 1's phone records, at least a complete set,
4 could obviate the need for third-party discovery
5 relating to the Perata family phone records. Is that
6 still the case, Ms. Glavin?

7 MS. GLAVIN: Judge, I think that's right. I
8 do want to think about it given that we still have --
9 we're still getting documents from troopers, so we may
10 revisit it. But for the time being, I think that's
11 right.

12 THE COURT: Okay. So at this juncture, I
13 think that the motion that was -- I think it was like
14 sort of a re-up of -- we talked about it at the last
15 conference. There was one motion, 136, that had a
16 broader swath of issues raised, and then 189 was like a
17 followup relating to Diane Perata's phone records
18 specifically. I think what we'll do is, you know, sort
19 of just terminate that motion as moot without prejudice
20 should anything arise later, once you've had an
21 opportunity to review these records, that you think is
22 still incomplete and relevant. Obviously, your first
23 recourse is to meet and confer with plaintiff's
24 counsel, see if you can work something out. But I do,
25 you know, hear you based on the allegations that have

1 been made in the case to date as to the relevance of
2 the phone records relating to Diane Perata's
3 deposition. So hopefully, this phone records
4 production will cover it.

5 MR. CRAIN: Your Honor, may I add something?

6 THE COURT: Yes. This is Mr. Crain,
7 correct?

8 MR. CRAIN: Yes, this is Mr. Crain. I'm
9 sorry, I didn't mean to jump in but I just wanted to
10 make sure.

11 THE COURT: No, go ahead.

12 MR. CRAIN: You know, the reason there's a
13 dispute at all is that this was going to sweep in a
14 huge number of numbers of really no bearing on this
15 case at all. There's sort of a prospect here, if now
16 subpoenas start getting issued to other phone numbers,
17 and defendants are investigating every other single
18 person she's called. We're not narrowing the issues
19 here today, we're opening up a whole new set of issues.
20 I'm not sure if there would be any willingness or any
21 scope to limit that kind of discovery at least at this
22 juncture as we try to just organize the process towards
23 the party depositions.

24 MS. GLAVIN: Your Honor, if I might be
25 heard.

1 THE COURT: Yes.

2 MS. GLAVIN: I don't know because I don't
3 know what's in these phone records and I don't want to
4 be, you know, boxed in. We want to keep moving the
5 fact discovery along in the case. So I just -- I feel
6 like this is very speculative. I don't know what's in
7 there. I haven't looked at them.

8 THE COURT: That's the problem with
9 hypothetical rulings in the discovery phase on
10 documents nobody has reviewed, Mr. Crain. There would
11 really be no basis for me to put guard rails up at this
12 juncture since I have no idea what's in there. It may
13 or may not be that she was in regular communications
14 with members of her team, work-related, perhaps totally
15 appropriately. It may be that she's having, you know,
16 2:00 a.m. conversations with folks that are highly
17 relevant to her determination to, you know, come
18 forward. I have no idea what's in there and I can't
19 possibly start to put up limits or guard rails or issue
20 protective orders without more granular facts.

21 MR. CRAIN: Understood, your Honor, thank
22 you. So we'll review and we'll see what's in there and
23 we'll take it from there.

24 THE COURT: Okay. I think that is the only
25 way we can proceed given the change in the landscape

1 that we have just heard about. So please do that, Ms.
2 Glavin. Please communicate -- give them the phone
3 records, stay in communication with regard to whatever
4 time frame you guys decide upon for the plaintiff to
5 provide the redactions back to you and the format in
6 which they will be providing the list of attorneys and
7 the indications of what was redacted and why, kind of
8 like a privilege log. I think that would be the best
9 approach so that you don't have to come back to me
10 later to fight about each redaction. That would
11 certainly really be boring for all involved.

12 MS. GLAVIN: I hope you're right, Judge. I
13 really hope you're right.

14 THE COURT: I mean, really, if you want to
15 put like boring discovery problems at the top of --

16 MS. GLAVIN: I'm with you, I'm with you.

17 THE COURT: And I don't mean to make light
18 of the seriousness of the issue, Mr. Crain. I
19 recognize Mr. Licul's argument at the prior conference
20 regarding the potential for an intrusion on her
privacy, so I'm not making light of it. But I do think
it's important that we prioritize the battles in this
case and choose the battles that are worth fighting.

24 That being said, is there anything that
25 anybody would like to say who hasn't yet had an

1 opportunity to be heard?

2 Mr. Steele, is there anything you'd like to
3 add or say?

4 MR. STEELE: No, your Honor, but thank you.

5 THE COURT: Ms. Foti?

6 MS. FOTI: No, nothing, thank you, your
7 Honor.

8 THE COURT: Okay. Is there anything else we
9 can realistically accomplish today on this topic? Mr.
10 Crain?

11 MR. CRAIN: No, nothing further from
12 plaintiff.

13 THE COURT: Okay. Ms. Glavin?

14 MS. GLAVIN: No, your Honor. Have a good
15 afternoon.

16 THE COURT: On the buzzer, 3:30, we're done.
17 All right, have a great afternoon, you guys. Take care
18 and stay safe.

19 MR. CRAIN: Thank you, your Honor.

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I certify that the foregoing is a correct
transcript from the electronic sound recording of the
proceedings in the above-entitled matter.

A rectangular box containing a handwritten signature in black ink. The signature appears to read "EMP" followed by a stylized surname.

ELIZABETH BARRON

February 1, 2024